Filed 6/8/10 Alvarez v. Orange Avenue Mobilehome Park CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CANDELARIA ALVAREZ et al., Plaintiffs and Respondents, v. ORANGE AVENUE MOBILEHOME PARK, LLC, Defendant and Appellant.	B216918 (Los Angeles County Super. Ct. No. BC401520)

APPEAL from an order of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

Gray Duffy, John J. Duffy, Frank J. Ozello and Brian M. Plessala for Defendant and Appellant.

Endeman, Lincoln, Turek & Heater, Henry E. Heater and Linda B. Reich for Plaintiffs and Respondents.

* * * * * *

Defendant and appellant Orange Avenue Mobilehome Park, LLC, appeals from an order denying its motion to compel arbitration or, alternatively, for judicial reference. Appellant sought to compel arbitration of claims alleging substandard park maintenance brought by 15 out of 54 current or former residents of the mobile home park who filed a complaint against it. We affirm. The trial court properly exercised its discretion in declining to enforce any arbitration provision on the ground that ordering arbitration risked the possibility of inconsistent rulings. Moreover, because an order denying judicial reference is not an appealable order, we decline to disturb the trial court's decision to deny judicial reference.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties and the Rental Agreements.

Appellant owns, operates and manages Orange Avenue Mobilehome Park (Park) in the City of Paramount. Plaintiffs and respondents are 15 current and former Park residents.

The Park issued four types of rental agreements to plaintiffs, designated as type A, B, C and D agreements. Plaintiffs Luis Garcia and Maria Garcia and nonplaintiff Adolfo Orozco signed the type A agreement. Plaintiff Silvia Orozco did not execute a rental agreement containing any type of arbitration provision, but lived with Adolfo Orozco. Paragraph 37 of the type A agreement provided for the arbitration of disputes, stating: "ALL DISPUTES SHALL BE SUBMITTED TO NON-BINDING MEDIATION AND, IF NOT RESOLVED, THEN TO BINDING ARBITRATION UNDER CODE OF CIVIL PROCEDURE §§ 1280, ET SEQ, DECIDED BY A RETIRED JUDGE FROM JUDICIAL ARBITRATION AND MEDIATION SERVICE, INC. [JAMS]." Paragraph 37 further identified the types of disputes not subject to arbitration, including those relating to the termination of tenancy for the failure to pay rent, injunctive relief, payment of the maintenance fee and condemnation. It also broadly defined "dispute" to encompass disputes, claims, demands or controversies relating to maintenance, enforcement of rules and regulations, living conditions and injury from negligent or

intentional conduct. The arbitration provision described the manner in which arbitration should be commenced, conducted and paid for, providing that the parties must share any costs equally. In the event the arbitration provision was held unenforceable, paragraph 37 further provided: "ALL ARBITRABLE ISSUES WILL BE REFERRED TO A REFERENCE AT JAMS AS PROVIDED BY CALIFORNIA LAW, INCLUDING CODE OF CIVIL PROCEDURE §§ 638, ET SEQ."

Plaintiff Jose Armando Villareal signed a type B agreement, which provided that the parties were required to attempt, in good faith, first to mediate any dispute utilizing the Paramount City Manager's office and to use their best efforts to reach an agreement on any such dispute. Disputes concerning the interpretation of any term or provision of the rental agreement not resolved though mediation were to be arbitrated by JAMS or the Dispute Resolution Center. The type B agreement also purported to limit the scope of arbitrable disputes, providing: "MATTERS OF DISPUTE SUBMITTED TO THE ARBITRATION COMMITTEE SHALL NOT INCLUDE UNLAWFUL DETAINER AND/OR EVICTION ACTIONS OR ANY MATTER OR ACTION OTHER THAN ONE TO DETERMINE INTERPRETATION OF THIS AGREEMENT. NOTWITHSTANDING ANYTHING TO THE CONTRARY, OWNER SHALL HAVE NO OBLIGATION TO ARBITRATE UNDER THIS PROVISION UNLESS AND UNTIL RESIDENT HAS PROVIDED OWNER THIRTY (30) DAYS' NOTICE SPECIFYING THE INTERPRETATION DISPUTE."[1] The type B agreement did not contain a judicial reference provision.

Plaintiffs Maria Quintero, Guisela Navarro, Juana Galvan and Gabriel Fonseca and nonplaintiff Nicolas Guerra signed the type C agreement which did not contain an arbitration provision. Rather, in a voluntary provision that applied only if offered and accepted by management and the tenant, the type C agreement provided for mediation and reference. The applicable paragraph provided first for general reference of all

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[1] The phrase "arbitration committee" is neither defined in nor used in any other portion of the rental agreement.

disputes with specified exceptions—including termination for nonpayment of rent, forcible detainer, specific types of injunctive relief, condemnation and the preservation of equitable rights—and then required mediation by JAMS. Only plaintiffs Guisela Navarro and Gabriel Fonseca initialed the agreement to signify that they accepted the voluntary mediation and reference provision. Plaintiffs Juana Galvan, Elizabeth Lopez and Maria Elena Lopez did not execute rental agreements containing judicial references provisions, but lived with nonplaintiff residents who signed the type C agreement.

Plaintiff Mildred Guy signed a type D agreement, which provided that any dispute between appellant and her may first be submitted to mediation and then for general reference. The type D agreement further provided that all parties waived their right to a jury trial, but thereafter stated: "NOTHING SET FORTH IN THIS AGREEMENT SHALL INTERFERE WITH HOMEOWNER FROM BRINGING A CLASS ACTION OR JOINT LAWSUIT WITHOUT THE PARK OWNER'S CONSENT."

The record does not contain rental agreements for plaintiffs Rosa Monje and Nicolas Sierra.

The Pleadings and Motions.

A total of 54 current and former Park residents—including plaintiffs—filed a complaint against appellant in November 2008, alleging causes of action including nuisance, breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, intentional inference with property rights and unfair business practices. They alleged that appellant failed to maintain the Park's common areas, facilities, services and physical improvements in good working order. They further alleged specific problems relating to the Park's sewer, water, electrical, laundry and gas delivery systems, as well as appellant's lack of maintenance throughout the Park and unresponsiveness to repair requests. According to the complaint, appellant knew of the Park problems, had the financial ability to remedy them and deliberately elected not to make repairs. The residents sought damages and declaratory and injunctive relief. They further sought to allege their unfair business practices claim as a class action.

The trial court overruled appellant's demurrer and denied its motion to strike, and appellant answered the complaint in April 2009, denying the allegations and asserting multiple affirmative defenses.

Also in April 2009, appellant filed a motion to compel arbitration and, alternatively, for judicial reference of plaintiffs' claims, and to stay the action in its entirety. Appellant relied on the arbitration and judicial reference provisions contained in plaintiffs' rental agreements. In support of the motion, appellant submitted the declaration of Park manager Michelle Duncan and attached plaintiffs' rental agreements thereto.

Plaintiffs opposed the motion on the grounds that appellant failed to meet its burden to show the existence of a valid agreement to arbitrate as to all plaintiffs; arbitration or reference risked conflicting rulings on common issues of law and fact; and the agreements were procedurally and substantively unconscionable. In support of their opposition, they submitted their own declarations in which they similarly averred that they did not recall signing or initialing any arbitration, mediation or reference provision; they were not permitted to negotiate any terms of the rental agreement; they did not intend to waive their right to a jury trial; and they could not afford to pay for mediation or arbitration. Several plaintiffs further declared they could neither read nor write English and never received any documents or verbal translation in their primary language of Spanish. Counsel's declaration pointed out that in support of its motion appellant had produced only eight rental agreements containing arbitration, meditation or reference provisions for 15 plaintiffs. Plaintiffs also submitted evidentiary objections to Duncan's declaration.

In turn, appellant replied and filed evidentiary objections to plaintiffs' declarations.

Following a May 11, 2009 hearing, the trial court denied the motion to compel arbitration on the basis that there was a possibility of conflicting rulings. Relying primarily on *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469 (*Fitzhugh*), the trial court reasoned that because the complaint alleged

systematic problems throughout the Park, "it would be a potential train wreck" to have inconsistent arbitration findings that various systems were or were not in working order. The trial court explained: "The feature here of a mobile home park, I think, that makes this different from a situation where there's simply multiple plaintiffs, is that there are a series of perhaps half a dozen systems that affect the whole park—electrical, roads, sewage, water, gas, security. Maybe more than half a dozen. And those seem to be the characteristic lines of attack for the plaintiff much more so than the individualized circumstances. So where such a web of systems unites the group, to pull it apart in smaller arbitration packages and litigation packages seems to me to magnify this possibility of inconsistency."

Appellant appealed from the order denying the motion to compel arbitration and/or judicial reference.

DISCUSSION

Appellant challenges the trial court's denial of its motion to compel arbitration on the ground that there was neither evidence to support nor any legal basis for the trial court to conclude that there was a risk of inconsistent rulings. We disagree. For that reason, we need not consider the other grounds raised by plaintiffs as a basis for affirming the order, including that the arbitration and mediation provisions are void or unconscionable. We also reject appellant's challenge to the trial court's denial of judicial reference because that order is not appealable.

I. The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Motion to Compel Arbitration.

Code of Civil Procedure section 1281.2[2] provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to

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[2] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."

We review an order denying arbitration pursuant to section 1281.2, subdivision (c) for an abuse of discretion. (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 348; *Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 Cal.App.4th 1320, 1329; *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 101 (*Henry*).) Under this deferential standard of review, "the trial court's order will not be disturbed on appeal unless it exceeds the bounds of reason." (*Henry, supra*, at p. 101.)

By focusing on the application of the exception to arbitration contained in section 1281.2, subdivision (c), the trial court appears to have assumed without expressly determining that appellant met its threshold burden to establish the existence of an agreement to arbitrate the dispute as to all plaintiffs. We cannot reach the same conclusion. (See *Mayflower Ins. Co. v. Pellegrino* (1989) 212 Cal.App.3d 1326, 1332 ["if the trial court's order denying the petition to compel arbitration is sustainable on any theory of law, it will be affirmed"].) The type C and D agreements contain no arbitration provision, and the type B agreement provides for arbitration of disputes relating to the interpretation of the rental agreement. Appellant submitted no evidence as to what type of agreement two of the plaintiffs signed. Accordingly, appellant met its burden to show the existence of a valid agreement to arbitrate only as to the three individuals who signed the type A agreement. Because appellant satisfied its threshold burden as to this limited number of plaintiffs, we proceed to address the trial court's exercise of discretion under section 1281.2, subdivision (c).

The California Supreme Court has explained that "'[s]ection 1281.2, [subdivision] (c) is not a provision designed to limit the rights of parties who choose to arbitrate or otherwise to discourage the use of arbitration. Rather, it is part of California's statutory scheme designed to enforce the parties' arbitration agreements . . . [it] addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.'" (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.) Section 1281.2, subdivision (c) provides that "the court may, in its discretion, refuse to compel arbitration or may stay arbitration where 'there is a possibility of conflicting rulings on a common issue of law or fact.' [Citation.]" (*Henry, supra,* 233 Cal.App.3d at p. 100; accord, *Fitzhugh, supra,* 150 Cal.App.4th at p. 475; *C. V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal.App.3d 1637, 1640–1641.) "The statute is unambiguous: it allows the trial court to deny a motion to compel arbitration whenever 'a party' to the arbitration agreement is also 'a party' to litigation with a third party that (1) arises out of the same transaction or series of related transactions, and (2) presents a possibility of conflicting rulings on a common issue of law or fact." (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 486 (*Whaley*).)

The trial court properly exercised its discretion to conclude the statutory elements were satisfied here. First, appellant and three plaintiffs were parties to an arbitration agreement that covered claims relating to appellant's failure to maintain the Park's common facilities, as well as parties to a lawsuit that alleged such claims. Second, plaintiffs alleged that various common facilities at the Park were inadequately maintained, in violation of statutory and administrative provisions and the common law. In support of their multiple legal theories plaintiffs alleged that appellant failed "to maintain the Park's common areas, facilities and physical improvements in good working order and condition" and that it "deliberately chose to ignore Park problems and ha[s] refused to fix or remedy these problems." They also identified specific inadequacies in each system, including problems related to the sewer, electrical, water and security systems. Whether the common areas, facilities and improvements were adequately

maintained, and whether any maintenance deficiencies violated any of the alleged statutory, administrative or common law rights of plaintiffs presented common questions of law and fact. Plaintiffs' requested declaratory and injunctive relief likewise presented common questions. Resolution of those common questions in different forums presented the possibility of inconsistent rulings on those issues. For example, in an arbitration the arbitrator might determine that appellant did not fail to maintain the common facilities and deny relief to the plaintiffs, while a trial court might reach a contrary finding and permit recovery by those plaintiffs not subject to an arbitration agreement. Additionally, there was the possibility that an arbitrator and a trial judge could make differing credibility assessments, leading to inconsistent factual determinations. Further, an arbitrator and a trial judge could make inconsistent legal determinations, as "contractual arbitration generally frees the arbitrator from making a decision strictly in accordance with the law [citation]." (*Mercury Ins. Group v. Superior Court, supra,* 19 Cal.4th at p. 345.)

The circumstances here present precisely the problem the Legislature intended to address through the enactment of section 1281.2, subdivision (c): "'In actions involving multiple parties with related claims, where some claimants agree to arbitrate their differences and others remain outside the agreement, *arbitration is unworkable*. Where a party to an arbitration agreement is also party to a pending court action or special proceeding, with such a third party, *there may be a possibility of conflicting rulings on issues of law or fact*.' (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1628 (1997–1998 Reg. Sess.) p. 2, italics added.) Thus, the statute was intended primarily to prevent conflicting rulings resulting from arbitration proceedings and other related litigation arising out of the same transaction." (*Whaley, supra,* 121 Cal.App.4th at p. 488.) Because plaintiffs in an arbitration might recover for their alleged injuries based on the same conditions of the Park for which litigating plaintiffs might be denied relief—or vice versa—the possibility of conflicting rulings on issues of law or fact plainly existed.

Numerous decisions are in accord, concluding that a trial court has broad authority to deny a petition to compel arbitration when granting the petition would create the

possibility of conflicting rulings on common issues of law and fact. (See, e.g., *Best Interiors, Inc. v. Millie & Severson, Inc., supra,* 161 Cal.App.4th at pp. 1329–1330 [general contractor's petition to compel arbitration of claims brought by subcontractor denied on the basis that building inspectors were parties to the litigation but could not be joined in the arbitration, and possibly inconsistent rulings could arise on the issue of whether the inspectors were agents of the project owner]; *Fitzhugh, supra,* 150 Cal.App.4th at pp. 475–476 [healthcare provider's petition to compel arbitration of claims brought by decedent's survivors denied on the basis that certain claims were not subject to arbitration and therefore "[i]f plaintiffs' claims proceed in different forums, there is a potential for inconsistent rulings on a common fact, such as whether any violations of the Patients Bill of Rights caused the decedent's injuries or her death"]; *Whaley, supra*, 121 Cal.App.4th at p. 486 [employer's petition to compel arbitration of claims brought by terminated employees denied on the basis that conflicting factual determinations could arise in an action involving the employer and another terminated employee arising out of the same transaction]; *C. V. Starr & Co. v. Boston Reinsurance Corp., supra,* 190 Cal.App.3d at pp. 1641–1642 [insurers' petition to compel arbitration of claims brought by underwriter denied on the basis that there was a risk of conflicting rulings on issue of allocation among numerous insurers who were not subject to arbitration].)

We find no merit to appellant's two challenges to the trial court's exercise of discretion. First, appellant contends that plaintiffs failed to meet their evidentiary burden to avoid enforcement of the type A agreement's arbitration provision. As explained in *Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633: "Section 1281.2 creates a summary proceeding for determining whether the parties should be ordered to arbitrate. The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence. The opposing party must meet the same evidentiary burden to prove facts necessary to its defense." As the trial court recognized, this principle has been applied to questions concerning the existence and interpretation of an arbitration agreement. (E.g., *American Federation of State, County & Municipal*

Employees v. Metropolitan Water Dist. (2005) 126 Cal.App.4th 247, 257.) But the imposition of an evidentiary burden has not been applied, and we would find it difficult to apply, to the portion of section 1281.2, subdivision (c) requiring that the trial court find the "possibility" of conflicting rulings on legal or factual issues. Indeed, courts routinely rely on the allegations contained in the operative pleading to determine whether there is the possibility of conflicting rulings within the meaning of section 1281.2, subdivision (c). (E.g., *Best Interiors, Inc. v. Millie & Severson, Inc.*, *supra*, 161 Cal.App.4th at p. 1330 [relying on the plaintiff's "allegation" and "claims" to find the possibility of conflicting rulings on agency and ratification]; *Fitzhugh, supra*, 150 Cal.App.4th at pp. 475–476 [finding the possibility of conflicting rulings on the basis of the inclusion of a claim alleging a violation of Patients Bill of Rights contained in title 22, section 72527 of the California Code of Regulations]; *C. V. Starr & Co. v. Boston Reinsurance Corp.*, *supra*, 190 Cal.App.3d at p. 1641 [explaining that "[t]he very nature of the controversy here fully supports the trial court's decision" to deny a motion to compel pursuant to § 1281.2, subd. (c)].) We construe this authority as supporting the trial court's reliance on the allegations of the complaint to determine that there was a possibility of conflicting rulings if appellant's motion were granted.

Second, appellant contends that because the question of damages was unique to each plaintiff, the individualized nature of each claim did not present a risk of conflicting rulings. But the fact that individual damage issues may vary does not affect the trial court's conclusion that the action involved common liability issues. Plaintiffs sought relief for appellant's inadequate maintenance of common facilities and systems throughout the Park. If their claims proceeded in different forums, there was a possibility of inconsistent rulings. An arbitrator could determine that appellant did not fail to maintain the common facilities, while the trial court could reach a contrary conclusion. If so, the litigating plaintiffs might recover for their injuries based on the same conditions of the Park for which the arbitrating plaintiffs were denied relief. "The existence of this possibility of conflicting rulings on a common issue of fact is sufficient grounds" to deny

a motion to compel pursuant to section 1281.2, subdivision (c). (*Henry, supra,* 233 Cal.App.3d at p. 101.)

II. The Order Denying Judicial Reference Is Not Appealable.

The trial court further denied appellant's alternative request for judicial reference. In its notice of appeal, appellant indicated that its appeal was also directed to that portion of the order. We conclude that the trial court's denial of appellant's alternative request for judicial reference is not appealable.

As explained in *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 342: "A reference for private judging is called a general reference. The referee is empowered to 'hear and determine any or all of the issues in an action or proceeding, whether of fact or of law' (Code Civ. Proc., § 638, subd. (a)), and to make a binding decision that 'must stand as the decision of the court.' (Code Civ. Proc., § 644, subd. (a).)" The agreement of both parties is necessary for a general reference, and "[a] predispute agreement for appointment of a referee is enforceable only if part of a 'written contract or lease.' (Code Civ. Proc., § 638.) The existence of such an agreement is determined under standard rules of contract interpretation. [Citations.]" (*Greenbriar Homes Communities, Inc. v. Superior Court, supra,* at p. 343.) Here, the type A, C and D agreements contained judicial reference provisions, though not all affected plaintiffs initialed the agreements to signify their consent to the reference provision.

Uniformly, the grant or denial of a request to enforce a judicial reference provision is reviewed by writ. (See *Treo @ Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055, 1060; *Woodside Homes of California, Inc. v. Superior Court* (2006) 142 Cal.App.4th 99, 101; *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 955; *Greenbriar Homes Communities, Inc. v. Superior Court, supra,* 117 Cal.App.4th at p. 342; *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 726; *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1085.) Notwithstanding this authority, appellant asserts that the order denying judicial reference is appealable. We disagree.

"A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment. [Citations.]" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.) "The appealability of the judgment or order is jurisdictional and an attempt to appeal from a nonappealable judgment or order will ordinarily be dismissed." (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297.)

Because there is no judgment in this matter, we turn to the provisions governing review of appealable orders. "A trial court's order is appealable when it is made so by statute." (*Griset v. Fair Political Practices Com., supra,* 25 Cal.4th at p. 696.) Appellant's purported appeal does not fall within any statutorily authorized category in section 904.1. Nor is the appeal authorized under section 1294, subdivision (a), which provides: "An aggrieved party may appeal from: [¶] (a) An order dismissing or denying a petition to compel arbitration." Under this provision, the denial of a motion or "petition to compel contractual arbitration is appealable." (*Mercury Ins. Group v. Superior Court, supra,* 19 Cal.4th at p. 349.) As explained in *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341, on both substantive and procedural levels "[t]here are significant differences between a judicial reference and a contractual arbitration." In view of these differences, and because nothing in section 1294 indicates that it was intended to apply to the denial of a request for judicial reference, appellant's appeal is not authorized by section 1294.

Further, the order is not made appealable by section 1294.2, which provides in relevant part: "Upon an appeal from any order or judgment under this title [governing arbitration], the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party." "[T]he ancillary jurisdiction conferred by section 1294.2 simply ensures that the appellate court can effectuate its ruling on an arbitration order, by permitting review of any other trial court decision affecting that specific order." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 769 (*Westra*).) For

example, an order denying a stay is reviewable on appeal from an order refusing to compel arbitration. (*Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 612, fn. 5; *Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 6, fn. 1.) But ancillary jurisdiction has not been extended to a simultaneous order compelling arbitration as to related parties involved in the same business transaction. (*Westra, supra,* at p. 769 [finding the nonappealable order compelling arbitration and the appealable order denying arbitration "logically separate and not intermediate to each other"].) Similarly, the court in *Merrick v. Writers Guild of America, West, Inc.* (1982) 130 Cal.App.3d 212, 220, determined that section 1294.2 did not authorize it to review an order sustaining a demurrer issued in connection with an order denying a petition to compel arbitration. The court explained that no ancillary jurisdiction was afforded because the order sustaining the demurrer "concerns only the merits of the underlying action and does not affect the order denying petition to compel arbitration which is the subject of the appeal. Expressed differently, review of the order sustaining the demurrer does not aid us in 'determining whether or not the appellant [Guild] was prejudiced by the error or errors upon which [it] relies for reversal . . . of the . . . order from which the appeal is taken' [citation]." (*Merrick v. Writers Guild of America, West, Inc., supra,* at p. 220.) Likewise, the judicial reference order did not fall within section 1294.2. Review of that order neither affected the denial of the motion to compel arbitration, nor involved the rights of any parties to arbitration. (*Westra, supra*, at p. 769.) Rather, the order denying judicial reference was "logically separate" from the order denying the motion to compel arbitration. (*Ibid*.)

Finally, we cannot conclude that the order is appealable under the collateral order doctrine, which operates as an exception to the one final judgment rule. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561.) According to that doctrine, "an interim order is appealable if: [¶] 1. The order is collateral to the subject matter of the litigation, [¶] 2. The order is final as to the collateral matter, and [¶] 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant. [Citations.]" (*Marsh v. Mountain Zephyr, Inc., supra,* 43 Cal.App.4th at pp. 297–298.)

Although certain appellate decisions have not mandated compliance with the third element, the majority view requires all three elements. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 2:77–2:80, pp. 2–45 to 2–48.) We agree with the view "that judicially compelled payment of money or performance of an act remains an essential prerequisite to the appealability of a final order regarding a collateral matter. [Citation.]" (*Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1237; accord, *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119 ["It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him"].) The challenged order failed to satisfy this element, as it did not direct appellant to pay money nor did it require appellant to act. "On the contrary, the order below *prevents* the performance of an act, namely," submission to judicial reference. (*Conservatorship of Rich, supra,* at p. 1235 [denial of motion to substitute counsel not appealable as a collateral order].)

We therefore have no jurisdiction to review the order denying judicial reference in this appeal. Appellant may challenge the order from the final judgment.[3] (*Sjoberg v. Hastorf, supra,* 33 Cal.2d at p. 119.)

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[3] We do not find that this case presents any extraordinary circumstances that would warrant our treating the appeal from the order denying judicial reference as a writ petition. (E.g., *Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1349; *Mid–Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1455.)

DISPOSITION

The order denying appellant's motion to compel arbitration is affirmed. Plaintiffs are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ